BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

WESTERN WASHINGTON REGION

STATE OF WASHINGTON

WEYERHAEUSER COMPANY, WASHINGTON AGGREGATES AND CONCRETE ASSOC., INC., ALPINE SAND & GRAVEL, INC., GLACIER NORTHWEST, INC. dba CALPORTLAND, GRANITE CONSTRUCTION COMPANY, MILES SAND & GRAVEL COMPANY, QUALITY ROCK PRODUCTS, INC. AND SEGALE PROPERTIES, LLC. Petitioners, v. THURSTON COUNTY, Respondent.	Case No. 10-2-0020c **COMPLIANCE ORDER**

THIS Matter came before the Board for hearing on June 5, 2012 following submittal of Thurston County's Mineral Resource Lands Compliance Report.[1] The Compliance Report was filed in response to the Board's June 17, 2011 Amended Final Decision and Order (AFDO) which found Thurston County's Resolution No. 14401 and Ordinance No. 14402 to be noncompliant with the Growth Management Act (GMA). Weyerhaeuser Company ("Weyerhaeuser") and Washington Aggregates and Concrete Association (WACA) filed objections.[2]

Board members Margaret Pageler, Nina Carter and William Roehl took part in the telephonic Compliance Hearing, with Mr. Roehl presiding. Petitioner Weyerhaeuser was

[1] Filed May 3, 2012

[2] Weyerhaeuser's Response to Thurston County's Compliance Report and WACA's Response to Thurston County's Compliance Report, both filed May 17, 2012

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represented by John T. Cooke, Petitioner WACA[3] by Ramona L. Monroe, and Segale Properties, LLC by Jami Balint. Thurston County ("County") was represented by Jeffrey G. Fancher and Veronica Warnock.

I. BURDEN OF PROOF

Following a finding of noncompliance, the jurisdiction is given a period of time to adopt legislation to achieve compliance.[4] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[5] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish the new adoption is clearly erroneous.[6]

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made".[7] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. . . Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.[8]

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[3] Petitioners referred to as Washington Aggregates and Concrete Association include, among others, Alpine Sand & Gravel, Inc., Glacier Northwest, Inc. dba CalPortland, Granite Construction Company, Miles Sand & Gravel Company, Quality Rock Products, Inc., and Segale Properties, LLC.
[4] RCW 36.70A.300(3)(b)
[5] RCW 36.70A.330(1) and (2
[6] RCW 36.70A.320(1), (2) and (3)
[7] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)
[8] RCW 36.70A.3201, in part

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In this case, the Board concluded the County's adoption of Resolution No. 14401 and Ordinance No. 14402 was clearly erroneous in regard to the County's Mineral Resource Lands (MRL) designation criteria and applicable development regulations. The Board's findings of non-compliance primarily involved the following:

- The County failed to consider the WAC 365-190 Minimum Guidelines as required by RCW 36.70A.170(2) when developing its MRL designation criteria; and
- The County failed to include Best Available Science in developing the minimum designation criteria and implementing regulations affecting critical areas as required by RCW 36.70A.172.

The Board declined to impose invalidity. Petitioners thus bear the burden to establish the County's compliance action is clearly erroneous

II. DISCUSSION

Issue to Be Decided

Whether Thurston County's action in response to the Board's AFDO appropriately addresses the violations of RCW 36.70A.035(2), RCW 36.70A.060, RCW 36.70A.170(2) and RCW 36.70A.172?

Thurston County's Resolution No. 14401 and Ordinance No. 14402, the legislative enactments giving rise to the Petitioners' original challenges, constituted revisions of its Comprehensive Plan mineral resource lands designation criteria (Resolution 14401) and implementing development regulations (Ordinance 14402). In the AFDO, the Board found:

- The County failed to comply with RCW 36.70A.035(2) as significant amendments to Resolution 14401and Ordinance 14402 were adopted subsequent to public hearing.
- The County requirement that a property owner obtain a Washington State Department of Natural Resources reclamation permit prior to designation of the owner's property as mineral resource land resulted in a violation of RCW 36.70A.060, a conclusion to which the County stipulated.
- The Board held Petitioners had substantiated challenges based on RCW 36.70A.170 as there was an inadequate record to support the County's consideration of and deviation from the minimum guidelines of WAC 365-190-020, WAC 365-190-040 and WAC 365-190-070 in regards to mineral resource lands and critical areas.

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- A violation of RCW 36.70A.172 resulted due to the County's failure to include best available science when adopting policies and regulations designed to protect critical areas.
- The Board also determined the County was not guided by RCW 36.70A.020(8), the GMA's Natural Resource Industries goal.

The County's efforts to achieve compliance with the AFDO culminated in adoption on April 17, 2012 of Resolution No. 14739[9] ("the Resolution") and Ordinance No. 14740[10] ("the Ordinance"). The Resolution constituted revisions to Chapter 3, the Natural Resources element of the County's Comprehensive Plan, while the Ordinance amended Chapter 20.30B of the County Code.

Initially, the Board observes the County addressed the RCW 36.70A.035(2) and RCW 36.70A.060 violations. The County clearly included in its public hearing notice the fact that the Board of County Commissioners would be contemplating not allowing co-designation of mineral resource lands and forest lands when taking legislative compliance action. The Petitioners do not dispute compliance in that regard.

A violation of RCW 36.70A.060 was found by the Board due to the County's requirement that a property owner seeking a MRL designation obtain a Department of Natural Resources reclamation permit prior to designation. The County's compliance action repealed that requirement.[11] Again, Petitioners do not contest compliance on that basis.

The Board finds the County has come into compliance in regards to the violations of RCW 36.70A.035(2) and RCW 36.70A.060 identified in the AFDO.

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[9] The Resolution amends the Thurston County Comprehensive Plan criteria for designating mineral lands of long-term commercial significance.
[10] The Ordinance amends the Thurston County Code, Chapter 20.30B.030, criteria for designating mineral lands of long-term commercial significance.
[11] Ordinance No. 14740, Attachment A, amendment of TCC 20.30B.030,1.d.(deletion)

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Whether or not the County has achieved compliance with the Board's AFDO findings of violations of RCW 36.70A.170[12] and RCW 36.70A.172[13] requires more extensive analysis. Weyerhaeuser and WACA challenge the County's action by which it continues to preclude co-designation of MRL and designated forest lands (the RCW 36.70A.170 violations). WACA also asserts the County failed to comply as BAS does not support denying co-designation of MRL when lands containing mineral resources overlap Fish and Wildlife Habitat Conservation Areas (FWHCAs); specifically, habitats of primary association with species listed as endangered or threatened under either the Endangered Species Act or state law, together with their associated buffers (the RCW 36.70A.172 violations). The RCW 36.70A.172 violations identified in the AFDO were grounded in the County's failure to include Best Available Science (BAS) when adopting policies and regulations intended to protect critical areas. In the AFDO, in addition to addressing FWHCAs, the Board also found the County failed to consider and include BAS in regards to policies and regulations affecting other types of critical areas as well: aquifer recharge areas, frequently flooded areas, wetlands, and geologic hazard areas. Although Petitioners do not raise challenges to the County's compliance efforts regarding those types of critical areas, the Board's role in compliance proceedings is not identical to that during initial consideration of a Petition for Review. See RCW 36.70A.300(3)(b) and RCW 36.70A.330 as well as *Abenroth, et al. v. Skagit County* and *Skagit County Growthwatch, et al. v. Skagit County.*[14] Consequently, the

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[12] Due to an inadequate record to support the County's consideration of the minimum guidelines of WAC 365-190-020 and WAC 365-190-070.

[13] Arising from the County's failure to include best available science when adopting comprehensive plan criteria and regulations designed to protect critical areas.

[14] "RCW 36.70A.300(3)(b) is explicit. It requires Skagit County to comply with the GMA in areas where the Board's August 6, 2007 Order found noncompliance . . . The issue in compliance proceedings is somewhat different than it is during an original adoption. In compliance proceedings, the Board has identified an area of the local jurisdiction's comprehensive plan or development regulations that do not comply with the GMA. The local jurisdiction is under an obligation to bring those areas into compliance and demonstrate that fact to the Board . . . While the ordinance that is adopted to cure non-compliance is entitled to a presumption of validity, nevertheless, the local jurisdiction must still demonstrate to the Board that it has addressed the area of noncompliance identified in the FDO. A mere lack of objection by the petitioner does not demonstrate that the non-compliant provision has been cured. . **. Even though Petitioners did not point out that the County had not taken action to comply pursuant to RCW 36.70A.300(3)(b), it does not relieve the County of its responsibility to comply with the requirements of the Growth Management Act or the Board of its**

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Board will review all of the County's actions regarding critical areas as well as its decision to deny co-designation of forest lands and MRL, and the co-designation of specified critical areas and MRL. Such a review in the context of this case involves the Minimum Guidelines adopted as Chapter 365-190 WAC.

Minimum Guidelines

The County asserts the issue of a failure to adequately consider the Minimum Guidelines was clearly addressed during the compliance process.[15] The Board agrees as the Record makes it abundantly clear the County's assertion is accurate.[16] Petitioners do not dispute that fact; rather, their argument is the County failed to justify its decision to deviate from the Minimum Guidelines.

By way of background, the County's 2008 decision in adoption of Resolution 14401 and Ordinance 14402 (the legislation originally challenged and addressed in the AFDO) was to deny dual designation of designated forest lands and MRL (and some critical areas and MRL, a topic which will be addressed later in this Order). The Board determined the County's action was contrary to the Minimum Guidelines, specifically WAC 365-190-020(5) and WAC 365-190-040(7), which now provide,[17] in relevant part (emphasis added):

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responsibility to determine compliance pursuant to RCW 36.70A.330(1) and (2)." *Abenroth, et al. v. Skagit County*, Case No. 97-2-0060c, coordinated with *Skagit County Growthwatch, et al v. Skagit County*, Case No. 07-2-0002, Order on Reconsideration, at 4-6 (Jan 21, 2009) (emphasis added).

[15] Thurston County's Response to Objection to Compliance Report at 4, 5

[16] See for example, AR 306, 311, 314, 317, 345, 346, 357 and 358

[17] The Minimum Guidelines, first adopted in 1991, were significantly amended in February 2010, well prior to the County's current compliance actions and during but prior to the County's original challenged action. The Board notes the cited language of both WAC 365-190-020(5) and WAC 365-190-040(7) did not appear in the 1991 WAC version. The 1991 version of WAC 365-190-020 included the following sentences: "It is the intent of these guidelines that critical areas designations overlay other land uses including designated natural resource lands. That is, if two or more land use designations apply to a given parcel or a portion of a parcel, both or all designations shall be made." WAC 365-190-040 included similar language: "These guidelines may result in critical area designations that overlay other critical area or natural resource land classifications. That is, if two or more critical area designations apply to a given parcel, or portion of a given parcel, both or all designations apply." The 2010 WAC language includes considerably more specificity including referencing overlapping natural resource designations, the need to consider incompatibility and the determination of the greater long-term commercial significance of overlapping yet incompatible potential natural resource designations.

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> WAC 365-190-020(5) The three types of natural resource lands (agricultural, forest, and mineral) vary widely in their use, location, and size. **One type may overlap another type. For example, designated forest resource lands may also include designated mineral resource lands.**
>
> WAC 365-190-040(7) Overlapping designations. The designation process may result in critical area designations that overlay other critical area or natural resource land classifications. Overlapping designations should not necessarily be considered inconsistent. If two or more critical area designations apply to a given parcel, or portion of a given parcel, both or all designations apply.
>
> (b) **If two or more natural resource land designations apply, counties and cities must determine if these designations are incompatible**. If they are incompatible, counties and cities should examine the criteria to determine which use has the greatest long-term commercial significance, and that resource use should be assigned to the lands being designated.

During compliance, the County staff recommended and the Planning Commission unanimously agreed to recommend language to the Board of County Commissioners (BOCC) allowing dual designation of forest lands and MRL. However, the BOCC's decision was to the contrary: preclude dual designation, thus deviating from the WAC 365-190-020(5) and 365-190-040(7) Minimum Guidelines.[18]

The County argues its deviation decision was supported by adequate rationale. "This decision was based on the anticipated impacts to the County's forestry resources in light of the wealth of mineral resources located outside of areas designated as long term forestry."[19]

Those anticipated impacts include, according to the County:

- Conversion from a forest use diminishes the ecosystem services forests provide, including carbon sequestration, air and water quality and habitat;
- Thurston County forests store more carbon than other Washington counties;

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[18] Resolution No. 14739 includes the following language: "Mineral Resource lands may not include lands designated for long-term forestry" while Ordinance No. 14740 includes similar language: "Designated mineral resource lands may not include lands designated for long-term forestry."
[19] Thurston County's Response to Objection to Compliance Report, pg. 6

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- Mining activity can occur over a period of years prior to reclamation, resulting in "measurable negative impacts to forest services".[20]

The County further suggests support for its decision lies in the fact that Thurston County has adequate mineral resources outside of designated forest lands to meet its needs.[21]

Weyerhaeuser and WACA, on the other hand, argue the record lacks any evidence of the incompatibility between MRL and designated forest lands to which WAC 365-190-040(7) refers. To the contrary, Weyerhaeuser states the only evidence in the Record discloses the two uses are compatible.[22] They cite the following information and statements provided by County staff:

- Only 5% of Thurston County's forest lands are also mineral lands.
- "So far the co-designation has not appeared to have impacted the resource availability."
- "We have received testimony that mines can be reclaimed or reforested."
- "At this time there does not appear to be any evidence in front of the Planning Commission to justify departure from the minimum guidelines."[23]

Weyerhaeuser argues the County's Record falls far short of the record which this Board found sufficient to justify deviation from the Minimum Guidelines in *Stordahl v.Clark County*.[24] In that proceeding, the Board characterized Clark County's expert reports, staff

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[20] *Id.*

[21] *Id.*at 6, 7; AR 366-3
The County argues the Record establishes that ". . . the County has adequate mineral resources outside of designated long-term forestry areas to meet its needs." (Thurston County's Response, at 6). The Board first observes RCW 36.70A.020(8), the Natural Resource Industries Goal, addresses maintenance and enhancement of natural-resource based industries. Such industries do not operate to provide product solely within a county's boundaries. Agricultural and timber products are not necessarily considered in that manner and neither should mineral resources.
Secondly, the Record clearly establishes the unique quality of and regional demand for "jetty rock" located in some Thurston County designated forest lands. The County's conclusion that it has sufficient capacity to meet its needs appears to refer primarily to sand and gravel, not to jetty rock. Classification of that particular resource may be warranted. The Record also is clear the demand for that type of "mineral resource" is at least region-wide. Finally, WAC 365-190-070(3)(d)(iv) and .070(4) both contemplate consideration of demand on a broader scale than a single county.

[22] Weyerhaeuser's Brief Opposing a Finding of Compliance, pg. 4, AR 320-10, 321

[23] *Id*. at 4, 5; AR 310-1, 357-37

[24] Case No. 96-2-0016c, Compliance Order, Dec. 17, 1997

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analysis and consideration of relevant information from state and federal agencies related to the specific impact of mining on a critical area (a 100 year floodplain) as “vast”. Weyerhaeuser contrasts that information with what it characterizes as Thurston County's "Staff Memorandum that concluded that forest lands provide a carbon sequestration function." Weyerhaeuser argues that memorandum, together with its attached reports, lacks any evidence linking MRL designation to a permanent loss of a forest’s carbon sequestration functions.[25] Rather, it states the reports all address the effects of permanent conversion of forest lands to other uses as opposed to mining followed by reforestation.[26]

Weyerhaeuser also takes issue with many of the Findings included in the Resolution and Ordinance, suggesting the Record is devoid of support for many of them and, in fact, refutes some of them.[27] WACA, in challenging the County's compliance efforts, also states the County failed to support departure from the Minimum Guidelines. It suggests the County ignored the Board's direction in the AFDO to justify its departure from the guidelines and, instead, based its departure decision on a "global phenomenon" (global warming) as opposed to considering unique, local bases for doing so.[28] It references the County staff observation that dual-designation is the typical practice of other Northwest counties.[29]

Having ascertained that the County “considered” the Minimum Guidelines during the compliance process and that the County deviated from those guidelines, the Board's analysis therefore must address the latitude a jurisdiction has to depart from them.

The Board's AFDO found the County, in electing to prohibit the co-designation of MRL and forest lands, not only failed to disclose adequate consideration of the Minimum Guidelines,

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[25] Thurston County’s Response to Objection to Compliance Report, pg. 6, AR 358
[26] *Id*. at 6
[27] *Id*. at 7, 8
[28] WACA’s Response to Thurston County’s Compliance Report at 3
[29] *Id*. at 4

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but also produced little or no rationale for departure from them.[30] RCW 36.70A.170(2) mandates consideration of Department of Commerce guidelines when designating natural resource lands, including MRL. Those guidelines were developed at the direction of the state legislature:

> RCW 36.70A.050 (in relevant part) (emphasis added):
>
> Guidelines to classify agriculture, forest, and mineral lands and critical areas.
>
> (1) Subject to the definitions provided in RCW 36.70A.030, the department [CTED, now known as Commerce] shall adopt guidelines . . . to guide the classification of . . . mineral resource lands . . .
>
> (3) **The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state.** The intent of these guidelines is to assist counties and cities in designating the classification of . . . mineral resource lands . . . under RCW 36.70A.170.

There have been numerous Board decisions which have stated a jurisdiction's record must illustrate evidence of consideration of the Minimum Guidelines, as well as some appellate court decisions which have focused on the Guidelines.[31] That being said, however, mere consideration while disregarding the guidelines would render the legislation meaningless. RCW 36.70A.050 states the guidelines are to be the minimum applicable to all jurisdictions and that the CTED/Commerce developed guidelines are to allow for regional differences. The Board assumes the Guidelines take regional differences into account as directed.

While issues involving consideration of the Minimum Guidelines have arisen before the Board, it does not appear the Board has clearly or consistently addressed deviation from them. Additionally, the Board has not clearly articulated the differences between designating natural resource lands and critical areas and the subsequent adoption of

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[30] "The record contains no discussion, no analysis and no rationale for departing from the Minimum Guidelines." AFDO, June 17, 2011 at 27

[31] Webster's New Twentieth Century Dictionary, Unabridged Second Edition, defines "guideline" as "a standard or principle by which to make a judgment or determine a policy or course of action."

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development regulations to reconcile overlapping designations, a topic addressed later in this Order.

In the *Manke* matter, the Western Washington Growth Management Hearings Board, in reviewing a challenge to Mason County wetland buffers and natural resource lands, including forest land designation criteria, stated in regards to the Guidelines (emphasis added):

> The GMAC's decision to select one buffer size for wetlands is puzzling in light of the contrast between this "one-size fits all" approach and the variable buffer sizes for rivers and streams. CTED guidelines, WAC 365-190-180(5), call for a variety of protections according to species and habitats. **No reason is apparent from the record for the rejection of these guidelines concerning wetlands buffers. Absent justification to the contrary, the guidelines should be followed.**[32]

Portions of the *Manke* Board decision were subsequently reviewed on appeal. In considering Mason County's criteria for designation of forest lands, the Court of Appeals in *Manke Lumber Company v. Diehl*[33] referred to the RCW 36.70A.050 guidelines in the following manner (emphasis added):

- **We apply the above WAC guidelines** to Mason County's IRO and conclude that the record does not support the Board's finding of noncompliance.[34]
- **The minimum guidelines require** counties to map natural resource land when making designation determinations. WAC 365-190-040(2)(b)(vii). **To satisfy this guideline,** the Resource Lands Subcommittee and the County considered several maps throughout the process of developing the IRO.[35]
- **The County did not violate these minimum guidelines** when it specified a threshold size for determining what parcels were large enough to be considered LTCFL land.[36]
- **The WAC guidelines specifically allow** counties to consider tax classification.[37]

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[32] *Diehl v. Mason County*, Case No. 95-2-0073, FDO, January 8, 1996
[33] *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793 (1998)
[34] *Id*. at 806, 807
[35] *Id*. at 807
[36] *Id*.
[37] *Id*. at 808

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- **The WAC guidelines specifically provide, inter alia, that the County shall also consider** the effects of proximity to population areas and the possibility of more intense uses of the land . . .[38]
- The GMA sets forth objectives and minimum guidelines that local governments **must follow** when classifying land.[39]

The words and phrases used by the Court of Appeals evidence the fact the Guidelines are more than simply something to be considered. Subsequently, the *Manke* decision was positively referred to by the Washington Supreme Court in *Lewis County v. Hearings Bd*.[40], a decision addressing Lewis County's designation of agricultural lands based on its adopted criteria (emphasis added):

- . . . **we approve of the approach used by the Court of Appeals in *Manke Lumber Co. v. Diehl*,**[41] (citations omitted) . . . **In holding that the Board erred, the court relied largely on WAC 365-190-050,** a Washington Department of Community, Trade and Economic Development regulation designed to guide counties in determining which agricultural and forest lands have "long-term commercial significance."[42]
- The court in *Manke* determined that the Board misapplied the GMA and that the county could limit forest land designations to parcels of at least 5,000 acres that have a forest tax classification **because the guidelines allow** consideration of "predominant parcel size" and "tax status" in determining long-term significance.[43]
- However, we do not decide whether Lewis County, in focusing on the needs of the local agriculture industry**, went beyond the considerations permitted by WAC 365-190-050** and RCW 36.70A.030 in designating agricultural lands. Unfortunately, Lewis County's briefs do not explain the extent to which the county applied the specified factors. And while Lewis County Ordinance 1179C does spell out in detail how the county considered WAC 365-190-050 factors in mapping agricultural lands, the record does not indicate **whether the county used permissible criteria in other decisions not explicitly tied**

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[38] *Id*.
[39] *Id*. at 804
[40] 157 Wn.2d 488, (2006)
[41] See also *Futurewise v. Cent. Puget Sound Growth Mgmt. Hearings*, 141 Wn. App. 202 at 211 (2007): "Our Supreme Court has held that a county may designate a minimum parcel size for certain land type designations **so long as the limitation is consistent with GMA and with CTED principles** . . . ."
[42] *Lewis County* at 501
[43] *Id*. at 502

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> **to the WAC factors. . .** Thus, upon remand, when the Board reviews whether Lewis County properly designated agricultural lands, **the inquiry should include whether the county's decisions were "clearly erroneous" in light of the considerations outlined in RCW 36.70A.030 or WAC 365-190-050**.[44]

Again, the Court's words make it abundantly clear the Guidelines are more than merely a series of topics to be addressed.[45] How then should they be construed so as to reconcile the RCW 36.70A.170(2) statutory direction to "consider" the Guidelines, which RCW 36.70A.050(3) states "shall be the minimum . . . that apply to all jurisdictions", or the Supreme Court's directive to the Board to review natural resource land designation "in light of the considerations outlined in RCW 36.70A.030 or WAC 365-190-050" while still allowing for "the broad range of discretion" granted to local government by RCW 36.70A.3201? That question is partially answered by the Board's statement in *1000 Friends of Washington, Evergreen Islands and Skagit Audubon Society v. City of Anacortes*[46], where it raised the concept of comparable benefit to the Minimum Guidelines (emphasis added):

> Further, to comply with RCW 36.70A.170(1)(d), **the City** should have considered the Minimum Guidelines pursuant to RCW 36.70A.172(2)[47] before it adopted the Forest Plan for the purpose of designating FWHCAs and **should have explained in the record either why the use of the Forest Plan for designating FWHCAs is consistent with the Minimum Guidelines or how designating the lands as set forth in the Forest Plan was of comparable benefit** as the process specified in the Minimum Guidelines.[48]

The Board acknowledges that ascertaining "comparable benefit" is necessarily somewhat subjective; reliance on such a standard does not provide the level of certainty jurisdictions desire. Having said that, the Guidelines are minimums - jurisdictions may meet them and they are also free to exceed those that by their nature establish standards or requirements.

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[44] *Id*. at 503, 504
[45] *See also* Henry W. McGee, Jr. and Brock W. Howell, 31 Seattle Univ. L. R. 549 (2008), *Washington's Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*
[46] Case No. 03-2-0017, FDO, February 10, 2004
[47] An apparent incorrect reference; the Board assumes the reference was intended to be to RCW 36.70A.170(2)
[48] Case No. 03-2-0017, FDO, February 10, 2004 at 16

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Furthermore, the Minimum Guidelines include suggestions and recommendations as well as requirements: they include use of the word "should" and "may" as well as directive words such as "shall" and "must".

Additionally, and of major significance, jurisdictions are allowed to allocate varying weight to many of the factors set forth for consideration in the Guidelines; the following caveat was articulated by the Supreme Court in *Lewis County*:

> ". . . the GMA does not dictate how much weight to assign each factor in determining . . . [in that case, long-term commercial significance of agricultural lands]. While a jurisdiction may weigh the various WAC factors differently, they may not: " . . . [go] beyond the considerations permitted by WAC 365-190-050 and RCW 36.70A.030"[49].

Thus, for example, in determining the long term commercial significance of MRL, the Minimum Guidelines use the phrases "should use", "should be based" and "should include".

It is that freedom to allocate varying weight or significance to the numerous recommended considerations included in the Minimum Guidelines which provides "the broad range of discretion" granted to local government by RCW 36.70A.3201. That discretion, however, is bounded by the Court's statement that counties and cities may not: ". . . [go] beyond the considerations permitted by WAC 365-190-050 and RCW 36.70A.030 . . . ."

The Board appreciates the fact its prior decisions have not provided clear and consistent analysis regarding the latitude a jurisdiction has to vary from the Minimum Guidelines. While the Western Washington Growth Management Hearings Board has issued opinions stating a city or county must provide "justification" for departure from the Minimum Guidelines[50], the Eastern Washington and Central Puget Sound Boards have held the

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[49] *Lewis County*, 157 Wn.2d 488 at 503, 504

[50] *See 1000 Friends of Washington, Evergreen Islands and Skagit Audubon Society v. City of Anacortes*, Case No. 03-2-0017, FDO, February 10, 2004, pg. 16: Just as with the designation of species and habitats of priority and local importance, the City should consider this guideline in designating Type 1-5 Waters and provide a rationale for departing from it, if it chooses to do so.

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Minimum Guidelines should merely be "considered".[51] Even in this Board's AFDO, noncompliance was based, in part, on the failure of Thurston County to provide an adequate record to support deviation from the Minimum Guidelines.[52]

However, based on the foregoing analysis, the Board concludes, in light of the *Manke* and *Lewis County* decisions, that RCW 36.70A.170(2) and RCW 36.70A.050 must be read to require jurisdictions to follow the Minimum Guidelines' MRL requirements. Jurisdictions have the flexibility to assign varying weight to the factors related to long term commercial significance included in RCW 36.70A.030 and the applicable Guidelines. Jurisdictions also have the discretion to depart from other portions of the Guidelines which are merely suggestions, provided the departure provides comparable benefit. That freedom, however, does not extend to deviating from those portions of the Minimum Guidelines which are requirements.

It is then necessary to examine the criteria adopted by Thurston County for the purpose of MRL designation. Did the County's decision to deviate from the Minimum Guidelines go beyond the requirements of WAC 365-190?

Dual Designation of MRL and Forest Lands

In this matter, Thurston County adopted criteria for later designation of mineral resource lands. Those criteria will be applied by the County during its upcoming RCW 36.70A.130 comprehensive plan and development regulation update. The result of application of the

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See also Diehl v. Mason County, Case No. 95-2-0073, FDO, January 8, 1996: Where a local jurisdiction departs from the Minimum Guidelines, the record must contain evidence of the City's "consideration" of the Minimum Guidelines or the statutory direction becomes meaningless.

[51] *See Easy, et al. v. Spokane County,* Eastern Case No. 96-1-0016, FDO, April 10, 1997, pg. 8: The Board agrees with the County's argument that the Minimum Guidelines are advisory rather than mandatory. *See also Twin Falls v. Snohomish County,* Central Case No. 93-3-0003c, Order on Dispositive Motions, pg. 7: The CTED] Minimum Guidelines are advisory only, to be considered by counties when classifying and designating natural resource lands. *See also Orton Farms, et al. v. Pierce County,* Central Case No. 04-3-0007c: The County, however, correctly points out that this Board has stated that the minimum guidelines are advisory and not mandatory.

[52] Page 27: "no rationale for departing from the Minimum Guidelines"; Page 23: "should have explained in the record. . . ." "Was of comparable benefit." "The Minimum Guidelines are not requirements."

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criteria must comply with GMA requirements. If in fact the criteria do not so comply, the resulting MRL designations will not comply.[53] That was the issue addressed by *Manke* and *Lewis County*: whether the criteria (and, in those matters, the application of the criteria) were GMA compliant.

Here, Thurston County opted to deviate from the following Minimum Guidelines (emphasis added):

> There are also qualitative differences between and among natural resource lands. The three types of natural resource lands (agricultural, forest, and mineral) vary widely in their use, location, and size. **One type may overlap another type. For example, designated forest resource lands may also include designated mineral resource lands.** Agricultural resource lands vary based on the types of crops produced, their location on the landscape, and their relationship to sustaining agricultural industries in an identified geographic area. WAC 365-190-020(5)
>
> **If two or more natural resource land designations apply, counties and cities *must* determine if these designations are incompatible**. **If they are incompatible, counties and cities should examine the criteria to determine which use has the greatest long-term commercial significance,** and that resource use should be assigned to the lands being designated. WAC 365-190-040(7)(b)

It is not contested that a portion of the County's designated forest lands include some mineral lands.[54] The Minimum Guidelines state that a jurisdiction *must* determine if two applicable yet overlapping natural resource designations are incompatible. The Record includes no determination by Thurston County that dual designation of MRL and forest lands is incompatible.[55] A Staff recommendation provided to the Planning Commission

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[53] For example, if a jurisdiction adopted agricultural resource lands designation criteria which failed to consider soil types using the land-capability classification system of the Soil Conservation Service (as required by WAC 365-190-050), the resulting designation would not be GMA compliant. So too if MRL designation criteria fall short of GMA compliance, the designation of such lands would fail to comply.

[54] AR 310-1: "5% of forest lands are also mineral lands."

[55] In fact, counsel for the County argued at the Hearing on the Merits an incompatibility determination was not a requirement. In addition, Counsel advised the Planning Commission and BOCC they merely had to consider the Minimum Guidelines, no doubt as a result of this Board's prior failure to clearly analyze and then articulate the significance of the Minimum Guidelines.

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includes the following: "Allow the co-designation of mineral resource lands and forest lands. There is not enough evidence given to support the opposite,"[56] as well as "Staff is recommending the co-designation again of forest and mineral lands because they have no valid evidence or research that there was a reason to prohibit the co-designation **and it is not incompatible**."[57] The Board agrees with Weyerhaeuser's assertion that the only information in the Record supports a conclusion that the two designations are compatible.[58] In addition to Staff observations, Weyerhaeuser introduced examples of mineral lands reclaimed as forest lands.[59]

The Record does include extensive scientific analysis assembled by the County which addresses the carbon sequestration capability of forests,[60] a supported comment that "NW forests sequester CO2",[61] BOCC comments that they have a responsibility to ensure air and water quality as well as to ensure a supply of gravel,[62] that forests are a more precious resource and must be protected,[63] that the potential for carbon sequestration is lost while mining is ongoing,[64] and many similar observations. That information is also unrefuted and the comments are entirely appropriate. However, as Weyerhaeuser observes, the County's findings and record lack any evidence which addresses incompatibility or would lead one to conclude that the co-designation of forest lands and mineral resource lands are incompatible. The reports attached to the Staff memorandum[65] address the impacts on forest benefits including, but not limited to, carbon sequestration resulting from a permanent loss of forest lands, as opposed to a temporary, albeit lengthy, loss of forest benefits during mining operations. Furthermore, the record does not include any analysis of the magnitude

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[56] AR 310-1
[57] AR 311-2
[58] AR 320-
[59] AR 320-10 and 320-11 together with accompanying photographs
[60] AR 358
[61] AR 366-1
[62] AR 366-2
[63] AR 366-3
[64] AR 366-3
[65] AR 357

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of impacts resulting from the possible mineral resource designation of a small percentage of Thurston County's forest lands.[66] A comment on the SEPA DNS stated: ". . . the assumption that prohibiting mining in forest resource lands provides any measurable benefit from carbon sequestration on a County scale is without any support or evidence in the record."[67] The County responded that it had "reviewed the importance of carbon sequestration in forests and the potential to release carbon into the atmosphere when forests are lost."[68] The response to the SEPA comment fails to address the key question of incompatibility. Earlier Staff observations relate more directly to that question.[69]

The County also argues its decision denying dual-designation of MRL and forest lands will result in other environmental benefits, including enhancement of air and water quality, reduction of soil erosion, protection of wildlife habitat as well as the aforementioned carbon sequestration benefit. WAC 365-190-060 (3) refers to those benefits as "secondary." That particular rule goes on to state that such secondary benefits should not be used so as a sole basis for designating or de-designating forest resource lands. First of all, that particular rule applies to forest resource lands, not mineral resource lands. The County was not addressing the designation or de-designation of forest resource lands, but whether or not to allow dual designation of such lands with MRL. In the context of this matter, the County's "secondary benefits" argument is not well taken.

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[66] The Board notes the irony of the County's following findings included in both the compliance Resolution and Ordinance (Resolution No. 14739 and Ordinance No. 14740): "[I]f a property owner believes that forest resource lands should be designated as mineral resource lands, that property owner can apply to re-designate the property as mineral resource lands. The property owner can simultaneously apply to have the property de-designated forest lands and designated as mineral resource lands." Re-designation of the land as MRL would result in the same negative effects the County's preclusion of dual-designation is said to foster, although they could possibly be permanent..

[67] AR 403-2

[68] *Id*.

[69] Only 5% of Thurston County's forest lands are also mineral lands; "So far the co-designation has not appeared to have impacted the resource availability"; "We have received testimony that mines can be reclaimed or reforested."; "At this time there does not appear to be any evidence in front of the Planning Commission to justify departure from the minimum guidelines."

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Furthermore, even if the Board were to assume the County's record establishes incompatibility between MRL and forest lands, the County failed to then proceed to the next step: ascertain which designation was of the greatest long-term commercial significance as required by WAC 365-190-040(7)(b).[70] That task would necessarily involve the County's consideration of the various WAC factors applicable to a determination of the long-term commercial significance of each of the two incompatible natural resource land designations.[71] In all likelihood, the analysis would not yield identical results everywhere throughout Thurston County, and the Comprehensive Plan could allow for different outcomes based on local circumstances.

In sum, the County's failure to determine whether overlapping MRL and FRL designations are incompatible and, if incompatible, to determine which resource provides the greatest long-term commercial significance, violates RCW 36.70A.170(2), WAC 365-190-020(5) and WAC 365-190-040(7)(b) and is clearly erroneous.

Finally, as stated, the classification and designation of natural resource lands of long-term commercial significance, including both the criteria for doing so as well as subsequent actual designations pursuant to RCW 36.70A.170, should be based on the factors set forth in the RCW 36.70A.030(10) definition of long-term commercial significance as well as the Minimum Guidelines.[72] It is then the function of development regulations[73] to conserve natural resource lands (as well as the protection of critical areas). See RCW

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[70] "If they are incompatible, counties and cities should examine the criteria to determine which use has the greatest long-term commercial significance, and that resource use should be assigned to the lands being designated."

[71] Set forth at WAC 365-190-070 (Mineral Resource Lands) and WAC 365-190-060 (Forest Resource Lands)

[72] Jurisdictions should heed the concern articulated by the Supreme Court in *Lewis County*, 157 Wn.2d 488, 503 (2006): to not go " . . . beyond the considerations permitted by [in that case] WAC 365-190-050 . . . ."

[73] RCW 36.70A.030(7): "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

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36.70A.060(1)(a), RCW 36.70A.060(2), RCW 36.70A.130(1)(a) and RCW 36.70A.131 as well as numerous sections of chapter 365-190 WAC.[74] Examples include the following: ". . . in other cases that risk cannot be effectively reduced except by avoidance of the critical area."[75] "Development regulations adopted to protect critical areas may limit some land development options."[76] "If a critical area designation overlies a natural resource land designation, both designations apply . . . reconciling these multiple designations will be the subject of local development regulations adopted pursuant to RCW 36.70A.060."[77]

Inclusion of BAS

In its decision concerning the originally challenged Resolution 14401and Ordinance 14402, the Board concluded Thurston County's record was inadequate to determine whether or not the County's decision to depart from the Minimum Guidelines in precluding dual designation of MRL and many critical areas considered permissible criteria "not explicitly tied to the WAC factors" or whether the County actually considered the WAC factors. The Board also found the County failed to demonstrate it included Best Available Science when it approved exclusionary criteria based on the presence of critical areas.

The following are included in Resolution No. 14739's Comprehensive Plan Minimum Designation Criteria:

> 5. Mineral resource lands shall not be designated within the Zone 1 (one-year) or Zone 2 (five-year) Horizontal Time of Travel boundaries for any Group A Public Water System.
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> 6. Mineral resource lands shall not include habitats of primary association to species listed as endangered or threatened under the Endangered Species Act or state law and their buffers as established by the Critical Areas Ordinance at the time of designation.

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[74] See for example WAC 365-190-020 (4) and (6), WAC 365-190-040 (6) and (7)(a)
[75] WAC 365-190-020 (4), in part
[76] WAC 365-190-040(6), in part
[77] WAC 365-190-070(7)(a), in part

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> 7. Mineral resource lands shall not include agricultural lands of long-term commercial significance, historical/cultural preservation sites, and any Federal Emergency Management Agency (FEMA) 100 year floodplain.
>
> 8. Mineral resource lands shall not include Category (class) One (1) or Two (2) wetlands or their protective buffers, but may include Category (class) Three (3) and Four (4) wetlands.
>
> 11. Mineral resource lands shall be located away from geologically hazardous areas such as marine bluffs, the bluffs area in the Nisqually Hillside Overlay, or areas that would cause a public safety hazard, but may include steep and/or unstable slopes, as provided by the Critical Areas Ordinance.

The Board's findings in the AFDO applied to aquifer recharge areas, frequently flooded areas, wetlands, geologic hazard areas as well as FWHCAs. The Board's review of the County's compliance actions in regard to the first four listed categories of critical areas (excluding FWHCAs) discloses extensive compilations, consideration, and application of BAS.[78] As previously observed, the Petitioners have not challenged the County's compliance efforts regarding those types of critical areas. In addition, the County's actions are entitled to a presumption of validity. The County has now demonstrated its consideration of BAS as related to aquifer recharge areas, frequently flooded areas, wetlands and geologic hazard areas. The Board finds the County's action complies with the GMA as to these critical areas.

WACA continues to contest the County's preclusion of MRL designation and permitting when mineral lands overlap habitats of primary association to species listed as endangered or threatened under the Endangered Species Act or state law.[79] WACA argues the County fails to reference any particular BAS and does not include BAS for each endangered or threatened species. It states such species are numerous and wide-ranging with varying

[78] AR 314, 317, 319, 346, 357, 358, 359, 407, 409, 416, 417 and 418
[79] WACA's Response to Thurston County's Compliance Report at 6

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habitat and conservation needs. WACA argues the County's conclusion that mining irreversibly affects all habitats is an unwarranted generalization.[80]

The County responds that BAS fails to include specific information on all endangered or threatened species' habitat needs. It states the body of scientific information is general in nature and discloses a link between habitat disturbance and species population declines.[81] Review of the Record discloses BAS links between habitat loss and population declines for the Mazama Pocket Gopher[82], the Taylor's Checkerspot butterfly[83], the Streaked Horned Lark,[84] as well as anadromous fish populations.[85] [86]

Furthermore, WAC 365-195-920 suggests using a risk-averse approach:

> **Criteria for addressing inadequate scientific information.**
> Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:
>
> (1) A "precautionary or a no risk approach," in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved; and . . .

The Board concludes the County has done just that; it has followed the cautious path. WACA has failed to meet its burden of proof to establish the County's action was clearly erroneous. The County has addressed the RCW 36.70A.172 violations identified in the AFDO involving a failure to include BAS.

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[80] *Id*. at 7
[81] Thurston County's Response to Objection to Compliance Report at 7-9
[82] AR 416-60
[83] AR 416-111
[84] AR 416-74
[85] AR 417 and AR-418
[86] AR 346-21 through AR 346-25

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However, while the County has clearly considered BAS in its decisions pursuant to RCW 36.70A.172, the difficulty arises due to a failure to comply with RCW 36.70A.170 and to follow the Minimum Guidelines. RCW 36.70A.170 requires counties and cities to designate natural resource lands "not already characterized by urban growth and that have long-term commercial significance". WAC 360-190-020(7) and WAC 360-190-040(7) require dual designation of overlapping designated critical areas and natural resource lands. It is then incumbent upon jurisdictions to craft development regulations to conserve the natural resource lands and protect the critical areas. The Board's analysis of application of the Minimum Guidelines in regards to the dual-designation of MRL and forest lands similarly applies to the question of the dual-designation of MRL and critical areas as addressed below.

Dual Designation of MRL and Critical Areas

RCW 36.70A.170 provides, in part, as follows (emphasis added):

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> > **(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and**
> >
> > **(d) Critical areas.**

WAC 365-190-020 (emphasis added):

> (7) It is the intent of these guidelines that critical areas designations overlay other land uses including designated natural resource lands. For example, **if both critical area and natural resource land use designations apply to a given parcel or a portion of a parcel, *both or all designations must be made.***

WAC 365-190-040 (emphasis added):

> (7) Overlapping designations. **The designation process may result in critical area designations that overlay other critical area or natural resource land classifications. Overlapping designations should not necessarily be considered inconsistent.** If two or more critical area

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designations apply to a given parcel, or portion of a given parcel, both or all designations apply.

> (a) **If a critical area designation overlies a natural resource land designation, both designations apply.** For counties and cities required or opting to plan under the act, **reconciling these multiple designations will be the subject of local development regulations adopted pursuant to RCW 36.70A.060.**

Protection of critical areas is the province of development regulations. That fact is made clear by RCW 36.70A.060 and RCW 36.70A.040(3) (set forth in part below), as well as WAC 365-190-040(7)(a) (above) (emphasis added):

> RCW 36.70A.060 (1)(a): . . . each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, **shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170**. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040
>
> (2) Each county and city **shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.** RCW 36.70A.040(3): . . . Any county . . . shall take actions under this chapter as follows: (b) . . . and adopt development regulations . . . protecting these critical areas . . .

Those statutory mandates are reinforced by the Minimum Guidelines:

WAC 365-190-020 (emphasis added):

> (4) There are qualitative differences between and among critical areas. Not all areas and ecosystems are critical for the same reasons. Some are critical because of the hazard they present to public health and safety, some because of the values they represent to the public welfare. In some cases, the risk posed to the public by use or development of a critical area can be mitigated or reduced by engineering or design; in other cases that risk cannot be effectively reduced except by avoidance of the critical area. **Classification and designation of critical areas is intended to lead counties and cities to recognize the differences among these areas, and to develop appropriate regulatory and nonregulatory actions in response.**

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(6) Counties and cities required or opting to plan under the act should consider the definitions and guidelines in this chapter **when preparing development regulations that preclude uses and development incompatible with natural resource lands and critical areas** (see RCW 36.70A.060). Precluding incompatible uses and development does not mean a prohibition of all uses or development. Rather, it means governing changes in land uses, new activities, or development that could adversely affect natural resource lands or critical areas. For each type of natural resource land and critical area, counties and cities planning under the act should **define classification schemes and prepare development regulations that govern changes in land uses and new activities by prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate.**

WAC 365-190-040 (emphasis added):

(6) Classifying, inventorying, and designating lands or areas does not imply a change in a landowner's right to use his or her land under current law. The law requires that natural resource land uses be protected from land uses on adjacent lands that would restrict resource production. Development regulations adopted to protect critical areas may limit some land development options. Land uses are regulated on a parcel basis and innovative land use management techniques should be applied **when counties and cities adopt development regulations to conserve and protect designated natural resource lands and critical areas.** The purpose of designating natural resource lands is to enable industries to maintain access to lands with long-term commercial significance for agricultural, forest, and mineral resource production. The purpose is not to confine all natural resource production activity only to designated lands nor to require designation as the basis for a permit to engage in natural resource production. The department provides technical assistance to counties and cities on a wide array of regulatory options and alternative land use management techniques.

(7) Overlapping designations. The designation process may result in critical area designations that overlay other critical area or natural resource land classifications. Overlapping designations should not necessarily be considered inconsistent. If two or more critical area designations apply to a given parcel, or portion of a given parcel, both or all designations apply.

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> (a) **If a critical area designation overlies a natural resource land designation, both designations apply.** For counties and cities required or opting to plan under the act, **reconciling these multiple designations will be the subject of local development regulations adopted pursuant to RCW 36.70A.060**.

Application of the designation criteria establishes the location of natural resource lands of long term commercial significance.[87] Designation is intended to provide for conservation of natural resource lands. Development regulations are intended to insure natural resource lands of long-term commercial significance, including MRL, are conserved and critical areas are protected. Some MRL will not be accessible due to critical area concerns as development regulations adopted to protect critical areas may limit some land development options[88], including mineral resource extraction. As the Thurston County staff observed: "The intent of designation of a mineral land is to locate and preserve potential mineral resources, not to outline where the applicant intends to mine."[89] Although that observation was made in the context of considering fish and wildlife habitat conservation areas, it is equally applicable to other critical areas.

The Board concludes that the exclusionary criteria designed to protect critical areas[90] included in the Resolution's Comprehensive Plan violate RCW 36.70A.170's mandate to designate MRL of long term commercial significance and critical areas and the WAC Minimum Guidelines which provide that if such designations overlap, both designations apply, and is clearly erroneous.

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[87] The Board wishes to clarify that not all mineral resource lands are required to be designated. One of the first considerations to be analyzed is whether the MRL are of long-term commercial significance, an analysis which must take into consideration the RCW 36.70A.030(10) definition and the WAC factors. For example, while the Record fails to clearly address the existence of long-term commercially significant mineral lands in specific critical areas, there is reference in the Record that some wetlands may "typically [be] devoid of significant [mineral] deposits." *See* AR 346-6 and AR 346-34.

[88] WAC 365-190-040(6)

[89] AR 346-25

[90] Resolution 14739, Attachment A, Minimum Designation Criteria, paragraphs 5, 6, 7, 8 and 11

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On the other hand, the Ordinance, in part, establishes development regulations[91] which are the appropriate method for "reconciling multiple designations." That section of the Code includes some of the development regulations designed to protect critical areas.[92] The Board previously addressed the County's original failure to demonstrate consideration of BAS as related to aquifer recharge areas, frequently flooded areas, wetlands and geologic hazard areas, and concluded the Record on compliance clearly shows such consideration. The Board also found WACA failed to meet its burden of proof to establish the County's consideration of BAS for FWHCAs was clearly erroneous. That conclusion applies equally to the County's action in adoption of development regulations protecting FWHCAs.[93] The County has addressed the RCW 36.70A.172 violations as they relate to the referenced development regulations included in TCC 20.30B.030.1.f.

The Board finds and concludes Petitioners have failed to carry their burden of proving continuing noncompliance with RCW 36.70A.172.

Invalidity

Weyerhaeuser and WACA both urge the Board to invalidate the County's MRL amendments. Weyerhaeuser cites the County's long-standing moratorium on new MRL

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[91] Amendments to Thurston County Code 20.30B.030, the County's Code section applicable to designated mineral lands.

[92] TCC 20.30B.030.1.f.i: Mineral resource lands shall not be designated within the Zone 1 (one-year) or Zone 2 (five-year) Horizontal Time of Travel boundaries for any Group A Public Water System.

f.ii: Mineral resource lands shall not include Category (class) One (1) or Two (2) wetlands or their protective buffers, but may include Category (class) Three (3) and the Four (4) wetlands.

f.iii: Mineral resource lands shall not include agricultural lands of long term commercial significance, historical/cultural preservation sites, and any Federal Emergency Management Agency (FEMA) 100-year floodplain.

f.iv: Mineral resource lands shall not include habitats of primary association to species listed as endangered or threatened under the Endangered Species Act or state law and their buffers as established by the Critical Areas Ordinance at the time of designation.

f.vi: Mineral resource lands shall be located away from geologically hazardous areas such as marine bluffs, the bluff area in the Nisqually Hillside Overlay, or areas that would cause a public safety hazard, but may include steep and/or unstable slopes, as provided by the Critical Areas Ordinance.

While it is unclear to the Board why the County elected to adopt critical area regulations separate and apart from its Critical Areas Ordinance, that is within the County's discretion.

[93] TCC 20.30B.030.1.f.iv

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designations. WACA argues the County has continuously failed to appropriately evaluate co-designation of MRL and forest lands and MRL and critical areas.

However, the Board declines to honor this request, particularly in light of the Board's clarification of its prior decisions, the significant amendments to chapter 365-190 WAC adopted by the Department of Commerce in 2010 and reanalysis of existing case law. The County will be provided adequate time to attain compliance.

III. ORDER

The Board finds Thurston County has achieved compliance with RCW 36.70A.172 through its inclusion of Best Available Science. Thurston County has also achieved compliance with RCW 36.70A.035(2) and RCW 36.70A.060. However, Thurston County has failed to achieve compliance with RCW 36.70A.170(1) and (2):

1. Thurston County adopted comprehensive plan and development regulation criteria precluding dual designation of forest lands and mineral resource lands of long-term commercial significance without first determining those two kinds of natural resource lands were incompatible and, further, without ascertaining which has the greater long-term commercial significance should such dual designation be found incompatible, in violation of RCW 36.70A.170(1) and (2), WAC 365-190-020(5) and WAC 365-190-040(7)(b);
2. Thurston County adopted comprehensive plan designation criteria precluding dual designation of mineral resource lands of long-term commercial significance and critical areas in violation of RCW 36.70A.170(1) and (2), WAC 365-190-020 and WAC 365-190-040.

This case is remanded to the County for compliance and the following compliance schedule shall apply:

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Item	Date Due
Compliance Due on identified areas of noncompliance	January 14, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	January 28, 2013
Objections to a Finding of Compliance	February 11, 2013
Response to Objections	February 21, 2013
Compliance Hearing – Telephonic Call 1-800-704-9804 and use pin 7757643#	**February 28, 2013 10:00 a.m.**

ENTERED this 17th day of July, 2012.

_____
William Roehl, Board Member

_____
Margaret Pageler, Board Member

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Nina Carter, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[94]

[94] Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.
Any party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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